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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 161

CLINTON FOODS, INC., CLAIMANT, AND CLINTON FOODS, INC., A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA AND HONORABLE BEN MOORE, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 31-38) is reported in 188 F. 2d 289. The opinion of the District Court appears at page 21 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered on April 2, 1951 (R. 39). The petition for

writ of certiorari was filed June 30, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an order of a District Court denying a change of venue is appealable.

2. Whether a seizure action brought under Section 304 of the Federal Food, Drug, and Cosmetic Act charging adulteration and misbranding may be removed to another district for trial.

STATUTES INVOLVED

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, 21 U.S.C. 301 *et seq.*, provides in part:

> SEC. 304. (a) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce, * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: *Provided, however,* That no libel for condemnation shall be instituted under this Act, for any alleged misbranding if there is pending in any court a libel for condemnation proceeding under this Act based upon the same alleged misbranding, and not more than one such proceeding shall be instituted if no such proceeding is so pending, except that such limitations shall

not apply (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this Act, or (2) when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer. In any case where the number of libel for condemnation proceedings is limited as above provided the proceeding pending or instituted shall, on application of the claimant, seasonably made, be removed for trial to any district agreed upon by stipulation between the parties, or, in case of failure to so stipulate within a reasonable time, the claimant may apply to the court of the district in which the seizure has been made, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, to which the case shall be removed for trial.

(b) The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case

shall be tried by jury. When libel for condemnation proceedings under this section, involving the same claimant and the same issues of adulteration or misbranding, are pending in two or more jurisdictions, such pending proceedings, upon application of the claimant seasonably made to the court of one such jurisdiction, shall be consolidated for trial by order of such court, and tried in (1) any district selected by the claimant where one of such proceedings is pending; or (2) a district agreed upon by stipulation between the parties. If no order for consolidation is so made within a reasonable time, the claimant may apply to the court of one such jurisdiction, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, in which all such pending proceedings shall be consolidated for trial and tried. Such order of consolidation shall not apply so as to require the removal of any case the date for trial of which has been fixed. The court granting such order shall give prompt notification thereof to the other courts having jurisdiction of the cases covered thereby.

* * * * *

(d) Any food, drug, device, or cosmetic condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the

provisions of this section, direct and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States; but such article shall not be sold under such decree contrary to the provisions of this Act or the laws of the jurisdiction in which sold: * * *

28 U.S.C. 1291 and 1404 provide as follows:

§ 1291. Final decisions of district courts—The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

§ 1404. Change of venue—(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been bought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

STATEMENT

Pursuant to Section 304 of the Federal Food, Drug, and Cosmetic Act the United States filed a libel of information in the District Court for the Southern District of West Virginia for the seizure and condemnation of a quantity of orangeade. The libel alleged that the product was misbranded and adulerated in violation of the provisions of the Act (R. 9-10). Clinton Foods, Inc., petitioner herein, appeared as claimant and filed a motion for a change of venue, requesting that the proceeding be transferred for trial to the United States District Court for the District of Maryland (R. 17). The motion for a change of venue was heard by the District Court and denied on October 6, 1950 (R. 21, 22).

Clinton Foods, Inc., thereafter appealed to the court below from the order of the District Court denying the motion for the transfer of the case (R. 25), and also filed a petition for a writ of mandamus to compel the Honorable Ben Moore, Judge of the United States District Court for the Southern District of West Virginia, to consider the motion for removal on its merits (R. 3-7). A motion to dismiss the appeal was filed by the United States (R. 25-26). The appeal, the petition for mandamus, and the motion to dismiss the appeal were all heard together (R. 30, 41). The court below dismissed the appeal on the ground that the order of the District Court was not appealable (R. 31-34),

and denied the petition for a writ of mandamus on the ground that the District Court had no power to transfer the cause (R. 35-38).

ARGUMENT

1. The court below followed the general and well-recognized rule that an order granting or refusing a change of venue is not a final decision within the purview of 28 U.S.C. 1291, and is not appealable. Petitioner asserts that the general rule has been modified by the decision of this Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, which held that the denial of a motion to require the plaintiff to post security for costs was appealable. This Court reached that conclusion on the ground that the motion was not a step toward final disposition of the merits of the case, would not be merged in its final judgment and that, unless the denial of the motion were reviewed, the rights conferred by the statute might be *irreparably lost*. The Court limited the application of this decision when it stated (p. 546): "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, * * *." It warned (p. 547), "But we do not mean that every order fixing security is subject to appeal."

In the instant case it cannot be said that the question of venue is a collateral or separate issue or that the denial of the change of venue would cause irreparable damage. At most, it can only cause

inconvenience. The *Cohen* case did not change the old established rule that an order on a motion for change of venue is not appealable, and the courts which have had the question before them since the *Cohen* case have consistently so held. *Jiffy Lubricator Co.* v. *Stewart-Warner Corp.*, 177 F. 2d 360 (C.A. 4); *Magnetic Engineering & Manufacturing Co.* v. *Dings Mfg. Co.*, 178 F. 2d 866 (C.A. 2); *Holdsworth* v. *United States*, 179 F. 2d 933 (C.A. 1); *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (C.A. 2); *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777 (C.A. 9).

Finally, it should be noted that the ultimate issue which is sought to be reviewed by petitioner is whether a seizure proceeding brought under Section 304 of the Federal Food, Drug, and Cosmetic Act is transferable to another district for trial. Since this question was determined by the court below in denying the petition for a writ of mandamus, the contention as to appealability becomes an abstract question not necessary to be determined.

2. Petitioner contends that Section 304(a) of the Federal Food, Drug, and Cosmetic Act should be liberally construed so as to permit a transfer of a seizure action charging both adulteration and misbranding.

It is, however, a long-settled concept in federal jurisprudence that the United States District Courts have only such jurisdiction as is expressly

vested in them by Congress. A District Court does not have inherent power to transfer or remove a case to another District Court.

As stated in *United States* v. *74 Cases, etc., C.C. Brand Oysters,* 55 F. Supp. 745, 747 (W.D. S.C.):

> In the absence of express statutory authority a district court does not have the authority to transfer a case to another district court for trial. See *Billings Utility Co.* v. *Federal Reserve Bank,* D.C.D. Mont. 1941, 40 F. Supp. 309; *Spies* v. *Chicago E.E.I.R. Co.,* C.C.S. D.N.Y., 1887, 32 F. 713; *In re Associated Gas and Electric Co.,* 2 Cir., 1936, 83 F. 2d 734. United States District Courts have no jurisdiction beyond that granted by Congress. *Applegate* v. *Applegate, D.C.,* 39 F. Supp. 887.

In Section 304(a) and (b), the Court will find the only statutory basis for removal of libel actions brought under authority of the Federal Food, Drug, and Cosmetic Act. Actually, Section 304(a) deals with removal of *a single libel action,* while Section 304(b) deals with consolidation and removal where libel actions are pending in two or more district courts and involve the same claimant and the same issues of adulteration or misbranding.

Since the instant case involves *a single libel action,* the Court must look to Section 304(a). Removal of a single libel action is authorized only

where the charge is misbranding. The language of Section 304(a) authorizing removal for trial is as follows:

> * * * In any case *where the number of libel for condemnation proceedings is limited as above provided* the proceedings pending or instituted shall, on application of the claimant, seasonably made, be removed for trial to any district agreed upon * * *. (Italics supplied.)

The same section *limits* the number of seizure actions which may be instituted by providing:

> That no libel for condemnation shall be instituted under this Act, for *any alleged misbranding* if there is pending in any court a libel for condemnation proceeding under this Act *based upon the same alleged misbranding,* and not more than one such proceeding shall be instituted if no such proceeding is so pending, except that such limitations shall not apply * * * (in stated cases). (Italics supplied.)

As is evident from the italicized provisions in Section 304(a), the only actions which may be removed under that section are those seizure actions in which the Government is limited to one proceeding based upon the same charge, namely, libel proceedings alleging misbranding. Reference to the final Congressional Conference Report on the Act clearly substantiates this view. House of Representatives Report No. 2716, Seventy-fifth Con-

gress, Third Session, Statement of the Managers on the Part of the House, declared at page 22:

> Change of venue when only one libel permitted.—*Under the House amendment where the number of libels for misbranding is limited to one proceeding,* such proceeding shall on application of the claimant seasonably made be removed for trial * * *. (Italics supplied.)

Since the only type of seizure action which is limited to one proceeding is an action in which the charge is misbranding, it follows that Section 304(a) does not grant authority to remove a single libel action in which the charge is *adulteration.* This was the explicit holding in *United States* v. *74 Cases, etc., C.C. Brand Oysters,* 55 F. Supp. 745 (W.D.S.C., 1944).

The instant libel proceeding is based upon charges of both adulteration and misbranding. Section 304(a) contains no provision limiting the Government to one action when both adulteration and misbranding are charged or authorizing a transfer of a single action in which such charges are made. Hence the general rule that a District Court does not possess such power in the absence of specific authority applies. The precise question of whether a single libel action charging both adulteration and misbranding may be removed by authority of Section 304(a) was presented in *United States* v. *11 Cases, etc., Ido-Pheno-Chon,* 94 F. Supp. 925 (D. Ore.), in which it is held that Sec-

tion 304(a) does not grant authority to transfer such an action.

The contention that Section 304 should be interpreted to mean that only one seizure may be made in a proceeding charging both misbranding and adulteration is in direct conflict with its clear language and would work a change in the section under the guise of construction. No rule of liberal construction justifies the interpretation of the language of the statute to mean something entirely different from its clear and obvious meaning. This Court has repeatedly said that the purpose of the food and drug legislation is the protection of the public, and that such legislation must be construed to support that purpose. See *Ewing* v. *Mytinger & Casselberry,* 339 U. S. 594, 601. In the seizure provisions, the law seeks, not only to keep contraband articles out of commerce, but to protect the consumer by their seizure and destruction before they reach the ordinary consumer channels. Several shipments may be made of the same article of food which is adulterated because of the presence of a poisonous ingredient. There is no limitation on the number of seizure actions since it is necessary that every such shipment be seized and proceeded against immediately, wherever found. To hold that the number of such proceedings must be limited where a charge of misbranding is included would in many cases defeat the provision for seizure and condemnation of dangerously adulterated articles.

28 U.S.C. 1404(a) provides that for the convenience of witnesses, etc., "a district court may transfer any civil action to any other district * * * where it might have been brought." As a basis for the contention that the court below placed an erroneous interpretation on Section 1404(a), petitioner states that all District Courts have the power to try seizure actions brought under Section 304 of the Federal Food, Drug, and Cosmetic Act; that the only requirement necessary to jurisdiction in any District Court is that the article proceeded against is capable of being found within the territorial limits of the United States. It is said that the provision in Section 304(a) of the Act, under which the article may be proceeded against and condemned "in any district * * * within the jurisdiction of which the article is found", relates to venue only. Therefore, petitioner argues, since this proceeding could have been instituted in the District of Maryland, and since the petitioner has waived the venue, a transfer is authorized under Section 1404(a).

The question of whether 28 U.S.C. 1404(a) may be applied to a seizure action brought under Section 304 of the Federal Food, Drug, and Cosmetic Act was presented in *Fettig Canning Company* v. *Steckler,* 188 F. 2d 715 (C.A. 7), certiorari denied 341 U.S. 951, in which it was held that Section 1404(a) cannot be applied to a seizure proceeding. In that case the shipment of the seized article

originated in the Southern District of Indiana to which removal was sought and the seizure action could have been instituted there if seizure had been made in that District. In this case the seized article had never even been in the District of Maryland to which district removal was requested. Faced with this obstacle, petitioner advances the startling proposition, noted above, that a seizure action may be brought in any district irrespective of where the article may have been found, and that the provision in Section 304(a) of the Federal Food, Drug, and Cosmetic Act fixing jurisdiction in seizure actions relates only to venue.

The jurisdiction of the District Courts for the seizure and condemnation of contraband articles under the Federal Food, Drug, and Cosmetic Act is prescribed in Section 304(a) of the Act, which provides that an adulterated or misbranded article may be condemned in any district court "within the jurisdiction of which the article is found."[1] The statute then provides for the filing of a libel of information and the issuance of a warrant of seizure or monition in accordance with admiralty

---

[1] It is fundamental concept that inferior federal courts have only such jurisdiction as is expressly vested in them by Congress. *Teel* v. *Chesapeake & Ohio Ry. Co. of Virginia*, 204 Fed. 918 (C.A. 6); *United States* v. *74 Cases, etc., C.C. Brand Oysters*, 55 F. Supp. 745 (W.D.S.C.). See, also, *Chicot County Drainage District* v. *Baxter State Bank et al.*, 308 U.S. 371, 376; *United States ex rel. Carapa* v. *Curran*, 297 Fed. 946, 954 (C.A. 2).

procedure. If the article is found and seized within the district, the court of that district has the power to enter a decree for the condemnation and destruction of the res in accordance with the provisions in Section 304(d) and to issue such process as is necessary to effectuate the decree. The court's jurisdiction to proceed is dependent upon the actual seizure of the article; if the article is not found and seized, there is nothing with respect to which any jurisdiction can be exercised. The proceeding is, therefore, one in rem. The contraband article is considered to be the offender, and the judgment or decree under Section 304(d) is directed against the property seized. See *Hipolite Egg Co.* v. *United States,* 220 U.S. 45, 57; *443 Cans of Frozen Egg Product* v. *United States,* 226 U.S. 172.

A proceeding in rem against specific property is local in character. *Casey* v. *Adams,* 102 U.S. 66; *The Willamette,* 53 Fed. 602 (D. Wash). A basic fact essential to the exercise of jurisdiction is the court's actual or constructive possession; the res must be actually or constructively within the reach of the court. *United States* v. *Mack,* 295 U.S. 480, 484; *Strong* v. *United States,* 46 F. 2d 257 (C.A. 1); *The Brig Ann,* 9 Cranch 289. Such a proceeding must necessarily be brought in the court within the jurisdiction of which the article may be found, and where the article may be subjected to the jurisdiction and power of the court. District courts

have no jurisdiction of seizure actions in respect to seizures made in a district other than the place where the proceedings are instituted. *Keene* v. *United States,* 5 Cranch 304; *The Little Ann,* Fed. Cas. No. 8397; *The Octavia,* Fed. Cas. No. 10422, affirmed, 1 Wheat. 20; *United States* v. *396 Barrels, etc.,* Fed. Cas. No. 16502; *The Idaho,* 29 Fed. 187 (D. Ore.).

This suit could not have been instituted in the Maryland District because the article was never in that District, was not found there, and could not be seized there. As the opinion of the Court of Appeals states in the *Fettig Canning Company* case, 188 F. 2d 715, 717 (C.A. 7), in which certiorari was denied by this Court (*supra,* p. 13):

> Title 21 U.S.C.A. § 334(a), on which the involved actions were predicated, provides, "Any article of food * * * that is adulterated or misbranded when introduced into or while in interstate commerce * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned *in any district court of the United States within the jurisdiction of which the article is found* * * * *" (Italics ours.) A proviso of this paragraph provides for the transfer of cases under certain enumerated circumstances, none of which it is claimed or appear to be relevant to the instant situation.
>
> No authority need be cited for the proposition that the jurisdiction of a Federal court is

> limited to that which Congress has expressly conferred. In view of the plain and unambiguous directive contained in the provision above quoted (italicized), it is not discernible how jurisdiction could be acquired by a District Court other than the one in whose territory the adulterated or misbranded articles were found. Jurisdiction has been made to depend upon that incident. A libel proceeding is one in rem against the contraband article, which is treated as the offender. *Cf. Hipolite Egg Co.* v. *United States,* 220 U. S. 45, 57 * * *. The basis of all jurisdiction in rem is the court's actual or constructive possession; the res must be within the reach of the court. *United States* v. *Mack,* 295 U.S. 480, 484 * * *; *Strong* v. *United States,* 1 Cir., 46 F. 2d 257, 260 * * *.

This is also the view of all of the other courts in which the question of removal of a seizure action under Section 1404(a) has been considered.[2]

The language of 28 U.S.C. 1404(b) supports the view that Section 1404(a) was not intended to apply to in rem actions. Section 1404(b) provides:

> (b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the

[2] *United States* v. *23 Gross Jars* * * * *Enca Cream,* 86 F. Supp. 824 (N.D. Ohio); *United States* v. *11 Cases, etc., Ido-Pheno-Chon,* 94 F. Supp. 925 (D. Ore.); *United States* v. *91 Packages* * * * *Nutrilite Food Supplement, etc.,* 93 F. Supp. 763 (D.N.J.).

> court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

It is obvious that the second sentence is meant to apply to transfers between divisions in the same district. The very fact that Section 1404(b) provides specifically for the transfer of in rem actions under certain circumstances from one division to another in the same district shows that Congress realized that such proceedings could not be transferred from one district to another district under Section 1404(a).

Petitioner's contention that Congress has conferred jurisdiction upon district courts to try seizure actions under Section 304 without territorial limitation is apparently based upon 28 U.S.C. 1345 and 1356. These sections are taken from Section 24 of the Judicial Code defining the original jurisdiction of the District Courts (28 U.S.C., 1940 ed., §41(1) and (3)) and define generally the subject matter of the general class of cases which the federal district courts are given the power to hear and determine. It is, however, fundamental that, in the absence of express authority by Act of Congress, the jurisdiction to hear the general classes of cases which the statute relegates to such courts is confined to the territorial limits of the districts es-

tablished by law. Under general provisions of law, a District Court cannot issue process beyond the limits of its district. *Robertson* v. *Labor Board,* 268 U.S. 619. The fallacy in petitioner's contention is that the power to adjudicate a particular case, as against the right to consider a general class of cases, cannot be exercised until a subject matter, or the parties, are brought into court so as to be subject to the court's power to act. *Toland* v. *Sprague,* 12 Pet. 300. A proceeding of this character must necessarily be brought in the District Court within the jurisdiction of which the article is found as is provided in Section 304 of the Act and generally in 28 U.S.C. 1395(b).

The decisions cited by petitioner do not in any way conflict with this fundamental rule as to the territorial limitations upon the jurisdiction of the federal district courts. *443 Cans of Frozen Egg Product* v. *United States,* 226 U.S. 172, was a seizure action brought under Section 10 of the Food and Drugs Act of 1906 (34 Stat. 768, 771) which is practically the same as Section 304 of the present Act. The question involved and decided was whether the proceeding was in admiralty so that the judgment of the District Court would be reviewable in the Circuit Court of Appeals by an appeal, or whether such proceeding was at law and reviewable only upon writ of error. The only question involved in *United States* v. *George Spraul & Co.,* 185 Fed. 405 (C.A. 6), was whether

previous executive seizure of the article is necessary to give the District Court jurisdiction to entertain the libel. These decisions do not in any manner support petitioner's contention that jurisdiction of a District Court extends to the territorial limits of the United States, or that the provisions in Section 304 and in 28 U.S.C. 1395(b) relate merely to venue.

Neirbo Co. v. *Bethlehem Shipbuilding Corporation,* 308 U.S. 165, and *Paramount Pictures* v. *Rodney,* 186 F. 2d 111 (C.A. 3), certiorari denied, 340 U.S. 953, both involved transitory actions in personam. The *Neirbo Company* case involved an injunction suit in which jurisdiction was based upon diversity of citizenship. The *Paramount Pictures* case arose out of a suit for treble damages under the Federal Anti-trust laws. In cases of that general character, it is the accepted doctrine that the applicable venue statutes (28 U.S.C. 1391 (b) and 15 U.S.C. 22) accord to the defendant a personal privilege which he may assert or waive at his election. But in a seizure action brought under Section 304 of the Act, the locus of the res is the essential fact which fixes the jurisdiction, since Congress has expressly conferred jurisdiction upon the court of the district wherein the article is found. Laws which prescribe generally where one may be sued do not apply to suits local in character. *Casey* v. *Adams,* 102 U.S. 66, 67-68. The ingenious method advocated by petitioner by which a waiver of venue

would supply the power and authority in a district court to remove a seizure action to any other district for trial cannot be seriously considered.

As noted above, the decisions are uniform in holding, as the court below held, that neither 28 U.S.C. 1404(a) nor Section 304 of the Federal Food Drug and Cosmetic Act can be applied to authorize the removal of seizure actions to another district for trial except as specifically authorized in Section 304.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be denied.

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